



**Uniting Church in Australia**  
SYNOD OF VICTORIA AND TASMANIA

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## **Justice and International Mission Unit Synod of Victoria and Tasmania, Uniting Church in Australia**

### **Submission to Exposure Draft and Explanatory Memorandum of the Illegal Logging Prohibition Bill 2011 May 2011**

The Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia (the Unit) welcomes this opportunity to make a submission on the exposure draft and explanatory memorandum of the *Illegal Logging Prohibition Bill 2011*.

#### **The Uniting Church's position on Illegal Logging and Corruption**

The Unit welcomed the Government's commitment in the lead up to the last Federal election that it would ban the importation and sale of illegally logged timber into Australia. The Synod of Victoria and Tasmania also supports such a policy outcome from three perspectives:

- That the policy will strengthen global efforts to stop local impoverished communities from having their forest resources taken illegally from them, and thus losing the resource without any compensation;
- That the policy will contribute to more sustainable management of global forest resources, noting that deforestation currently contributes in the order of 20% of greenhouse gas emissions globally; and
- That the policy is consistent with Australia's obligations under international treaties to assist in the global efforts to eliminate corruption.

In 2004, as part of a broad resolution on forestry, the annual meeting of representatives of the Synod of Victoria and Tasmania resolved:

*(v) To call on the Australian Government to:*

- *Work with other governments in the Asia-Pacific region (especially those of Indonesia, Papua New Guinea and Malaysia) to end illegal logging activities;*
- *only allow the importation of certified timber and wood products, certified under internationally recognised schemes such as that of the Forest Stewardship Council or the Pan-European Forestry Council;*

The Justice and International Mission Unit believes there is a need to combat corruption, which is a factor in efforts to eradicate poverty globally. The Uniting Church in Australia at its Inaugural Assembly in 1977 stated that in response to the Christian gospel:

*We pledge ourselves to seek the corrections of injustices wherever they occur. We will work for the eradication of poverty and racism in our society and beyond.*

The 2007 annual meeting of representatives of the Synod of Victoria and Tasmania passed a resolution acknowledging “*there is a need to address corruption within developing countries to work towards the eradication of poverty*” and “*some wealthy countries continue to maintain laws and practices that foster, reward and allow them to benefit from corruption in developing countries*”. The resolution commended the Australian Government for the steps it had taken to combat corruption globally and urged that a number of further measures be taken. It also lamented that church members had been the beneficiaries of corruption in developing countries largely through the purchase of goods at lower prices due to corruption being involved in their production.

In March 2008, the Justice and International Mission Unit published a report on global corruption, *From Corruption to Good Governance*, which outlined Australia’s performance in tackling corruption and what further actions could be taken. The report was endorsed by TEAR Australia, the Christian World Service of the National Council of Churches in Australia and Transparency International Australia.

The Unit therefore supports a ban on the sale of all timber and wood products that have not been sustainably logged. However, the Unit realises that from a scientific perspective there is no clear definition of ‘sustainable’ forest management at this point in time. Defining sustainability is complicated by the need to balance conflicting social, environmental and economic demands. Thus, defining sustainable forest management performance thresholds would not just be a technical matter, but a social and political matter as well.

Thus, the Unit accepts that measures to ban illegally logged timber and wood products from being imported and sold into Australia is a more achievable outcome. The ban needs to include any timber and wood products that fit the definition of being produced from illegally logged timber in Australia, too.

In considering a ban on the sale and importation of products made with illegally logged timber, the Unit believes there is a moral and values dimension. Simply, Australia should be seeking to combat corruption and not be accepting products that are the proceeds of crime. This is different to the amoral approach that argues that Australia should not act to stem corruption in logging globally (and therefore embrace the proceeds of crime entering the Australian market) until it can be sure that the actions it takes will have a practical impact. The argument the Unit supports is that Australia should not participate in corruption, even if other countries fail to live up the same standard.

The Unit notes Australia’s anti-corruption treaty obligations with regards to taking steps to ending corruption in the logging industry and ensuring that the Australian market for timber and wood products does not foster or reward corruption. These obligations includes taking steps to ensure that there is not bribery of foreign public officials and that Australia is not a haven for the proceeds of crime (with significant amounts of illegally logged timber products likely to meet the internationally accepted definition of the proceeds of crime). Such obligations are contained within the following treaties that Australia has committed itself to uphold:

- *UN Convention Against Corruption;*
- *OECD Convention on Combating Bribery of Foreign Public Officials in International Business;* and
- *UN Convention against Transnational Organised Crime.*

The Unit strongly supports a black letter law approach to the banning of the sale and importation of timber and wood products that have been produced from timber that has been illegally logged, whether the illegal logging has occurred in Australia or overseas. The Unit’s

preferred model is for a certification process with independent auditing that guarantees chain of custody to ensure the timber used was not illegally logged and corruption was not involved in the logging process. Independent auditing and regular sampling by accredited auditors are vital to have an effective scheme to detect illegal logging, given the ability to obtain forged authorisation documents or to pay bribes to get the legitimate documentation.<sup>1</sup>

The legislation needs to outline the penalties for importing or selling timber or wood products that do not meet the required level of certification, with regulation being used to specify the required standard for certification schemes that would represent acceptable standards.

### **Definition of Illegal Logging**

The Bill defines illegal logged as:

*In relation to timber, means harvested in contravention of laws in force in the place (whether or not in Australia) where the timber was harvested.*

However the Explanatory Memorandum notes that (p. 5):

*The Australian Government defines illegal logging as occurring when:*

- *Timber is stolen*
- *Timber is harvested without the required approvals or in breach of a harvesting licence or law*
- *Timber is bought, sold, exported or imported and processed in breach of law, and/or*
- *Timber is harvested or trade is authorised through corrupt practices.*

Thus, the definition for illegally logged in the Bill appears far more narrow than the Government's own understanding of illegal logging.

The definition in the Bill should at least be brought into line with Article 2 of the EU Regulation 995/2010:

*(g) 'illegally harvested' means harvested in contravention of the applicable legislation in the country of harvest.*

*(h) 'applicable legislation' means the legislation in force in the country of harvest covering the following matters:*

- *rights to harvest timber within legally gazetted boundaries,*
- *payments for harvest rights and timber including duties related to timber harvesting,*
- *timber harvesting, including environment and forest legislation including forest management and biodiversity conservation, where directly related to timber harvesting,*
- *third parties' legal rights concerning use and tenure that are affected by timber harvesting, and*
- *trade and customs, in so far as the forest sector is concerned.*

### **Penalties**

The current Bill offers an adequate penalty for an individual found to have imported a product containing illegally logged timber under Part 2, Division 1, Section 6.

The Unit notes that the imprisonment penalty is in line with the US *Lacey Act*.<sup>2</sup> A person found guilty of a *Lacey Act* felony faces up to five years in prison, significant fines and forfeiture. A failure to exercise due care can expose an organisation or an individual to civil penalties of up to US\$10,000 per violation of the Act.

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<sup>1</sup> Saskia Ozinga and Leontein Krul (2004), 'Footprints in the forest: Current practice and future challenges in forest certification', FERN, UK, pp. 34-35.

<sup>2</sup> Marcus A. Asner and Grace Pickering, *The Lacey Act and the World of Illegal Plant Products*, Environmental Law in New York, Volume 21, No. 6, June 2010, pp. 101 – 105.

The *Lacey Act* provides that plant products that contain illegally taken plant material are subject to forfeiture even if the owner had no reason to know that the products are illegal. Although the illegal plant content may be hard to prove, if the government manages to do so, each person or entity along the supply chain may be required to forfeit their goods, regardless whether the person or entity exercised due care or knew of the illegality.

The Unit believes there is a need to add a penalty for a body corporate that engages in importing a product containing illegally logged timber. Such a penalty should at least match the penalties for the payment of a bribe to a foreign official contained within *The Criminal Code Act 1995* given that bribery is a key feature of most illegal logging activity. The fine that can be imposed on an individual was a maximum of \$1.1 million and up to the greatest of the following for a body corporate:

- \$11 million;
- Up to three times the value of the benefit of the bribe where the value of the benefit obtained has been determined by a court; or
- Up to 10% of the annual turnover of the company.

Bribery plays a significant role in illegal logging. For example, an analysis of corruption related to logging in Papua by the internationally renowned U4 Anti-Corruption Resource Centre points out all the levels at which bribes can be paid to facilitate illegal logging with a resulting loss of legitimate revenue to the Indonesian Government:<sup>3</sup>

#### *District Level*

*Under the current payment system, local governments – through the district forestry service unit (DFSU) – have the primary responsibility for collecting forest revenues. They have information on the planned and actual logging conducted by each forestry company within their jurisdiction. They also have the power to issue payment documents and to control this payment. Finally they have the authority to examine the consistency of wood produced by a forestry company and the amount paid in fees.*

*These cash payments must go directly to bank accounts owned by the MoFOR [Ministry of Forestry]. There are three main opportunities for bribery here, however. First, the DFSU can allow certain amounts of logs to go unreported so that forestry companies do not have to pay fees. This corrupt practice is very costly to the forestry company, however, since it must then also bribe all government and law enforcement officers involved in the wood's movement from forest to market. Second, the DFSU may take bribes for allowing companies to plan more logging than their concessions allow. This practice allows forestry companies to incorporate illegal logs they collect or buy in their wood production reports. Third, the DFSU can work with bank officials to endorse false payment documents as if the forestry company had made payments. A key weakness here is that the current payment system does not provide solid sanctions for improper payment, while it is also difficult to track payments for each individual forestry company.*

#### *Provincial Level*

*A second level of corruption takes place in the Provincial Forestry Services Unit (PFSU). PFSU officers control annual wood production plans by forestry companies with valid logging licences. They can approve annual plans, however, only once the forestry companies pay their fees. With this power, they can examine all fee payment records, including evidence of transfers to accounts held by the MoFOR. Ideally, the PFSU should receive documents related to actual wood production and the payment of fees by all forestry companies from its DFSU colleagues. Unfortunately, however,*

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<sup>3</sup> U4 Anti-Corruption Resource Centre, "Corruption and forest revenues in Papua", June 2008, pp. 2-3.

*under the current autonomous local government system, the DFSU is not subordinate to the PFSU. As a result, the former can potentially ignore the latter's requests without sanction, including where there are an obligation to provide documents related to forestry companies.*

*Bribes worth more than a billion Rupiah (or about US\$100,00) per year, can lead the PFSU to approve a company's annual plans without proper control of its fee payments or the amount of logs to be cut. An annual plan approved in this way will typically indicate much higher annual wood production than that under a sustainable forest logging operation. This is used by forestry companies to include illegal logs in wood production reports as if they were from legal logging concessions. This form of 'wood-laundering' has been practised by forestry companies in other parts of Indonesia for many years.*

The Unit believes that a breach of Section 6 of the Act should result in mandatory forfeiture of the illegally sourced timber and wood products. It may also allow for suspension of the authorisation to import timber or wood products, as suggested in Article 19 of the EU Regulation 995/2010.

The Unit believes the level of penalty under Sections 7 and 8 must be at a sufficient level as to act as a deterrent against the unapproved importation or processing of regulated timber products and to avoid a business calculating that it can afford to wear the penalty from importing or processing illegally harvested product. As noted by Cliff Rees, Partner at PricewaterhouseCoopers in Indonesia:<sup>4</sup>

*The most important issue in any business decision is not ethics. For businesses, it is risks. If a transaction is considered to be low-risk with high returns, then from a business perspective, it is an ideal transaction. Now if we want to change decisions made by businesses, then we have to change our approach, and not focus purely on ethics.*

*This means that we need to increase the legal risks associated with corruption. Through the passage of strong laws prohibiting corruption, enforcing the law is actually publishing the identities of wrongdoers. Second, we need to ensure that businesses start considering the legal and reputation risks associated with corruption and consider these risks in making decisions.*

The Unit is not convinced at this stage that a maximum penalty of 100 penalty units is a sufficient deterrent in all foreseeable cases. Forfeiture of the timber or wood products in question would go a substantial way to providing a greater deterrent to any business calculation based on the likelihood of escaping detection and the cost related to getting caught engaged in unapproved importation or processing.

### **Entry into Force**

The Unit is concerned that although Sections 3 to 6 of the Act come into force within the period of six months of the Act receiving Royal Assent, the offence under Section 6 relies on the definition of regulated timber product. Section 5 states that 'regulated timber product' will be prescribed by the regulations. Thus, the ability of Section 6 to function is dependent on the development of the regulations that prescribe 'regulated timber product'. The Unit would instead support the Bill prescribing a non-exhaustive list of regulated timber products that could be expanded upon in the regulations, as has been done in the Annex to the EU Regulation 995/2010. This would allow for Section 6 of the Bill to come into force sooner.

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<sup>4</sup> ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, "Fighting Bribery in Public Procurement in the Asia and the Pacific", 2008, p. 191.

### **The need for a Declaration by Importers**

The Unit believes the Bill should include a provision requiring importers and traders to provide a declaration that would include species, the supplier, name and address of the recipient trader, country of origin and any certification on the product. It is our understanding that the declaration requirement under the US *Lacey Act* has helped drive much of the change in the timber supply chain, by forcing importers and traders to question their suppliers.

### **Certifiers**

The Unit is concerned that the legislation does not contain any provisions that would exclude a body being able to be made an approved timber industry certifier where a conflict of interest may exist, other than the provisions on the Minister outlined in Section 9(2) of the Bill. The Unit believes the Bill should adopt a provision similar to Article 8(2c) of the EU Regulation 995/2010 that requires a monitoring organisation must have an “absence of any conflict of interest in carrying out its functions.”

### **Due Diligence Requirements**

The Bill should include an outline of the due diligence requirements that will be specified in the regulations and these should include the elements contained within Article 6 of the EU Regulation 995/2010:

- Description, including the trade name and type of product as well as the common name of tree species and, where applicable, its full scientific name;
- Country of harvest, and where applicable:
  - Sub-national region where the timber was harvested; and
  - Concession of harvest;
- Quantity (expressed in volume, weight or number of units);
- Name and address of the supplier to the operator;
- Name and address of the trader to whom the timber and timber products have been supplied;
- Documents or other information indicating compliance of those timber and timber products with the required standard of legality; and
- Risk assessment procedures to analyse and evaluate the risk of illegally harvested timber or wood products being imported or processed.

### **Review**

The Bill should include a provision for review of the efficacy of the legislation within five years from the commencement of the Act.

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